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LIABILITY FOR STOCK ISSUED FOR OVERVALUED PROPERTY. — Probably nowhere to-day are corporations forbidden to issue stock payable in property necessary for the conduct of their business. The creditors' right to reach unpaid subscriptions renders important the determination as to when stock so issued is to be regarded as full-paid. The multitude of decisions on this subject discloses the widest diversity. There is a clear-cut difference between England and America. An English creditor must work out his rights through the corporation, and, therefore, normally, any contract between company and stockholder is conclusive.[1] But in this country, owing to the creditor's larger rights, for which various theories have been advanced, of which the "trust-fund" doctrine is the most widely accepted, the corporation's bargain is not necessarily binding on him.[2] One line of cases maintains that when stock is issued in good faith, despite overvaluation of the property, the stockholder is protected from further liability.[3] Thus, where a partnership through a book-keeper's error excessively capitalized its assets, the stock received in exchange was deemed full-paid.[4] Again, the uncertainties of mining have led the courts to sanction the purchase of mining properties at purely speculative valuation, though these rulings have been discredited by recent decisions.[5] The United States Supreme Court has also sanctioned the issuance of stocks for property worth merely the market value of the shares to enable a going concern to pay debts or prosecute its business.[6] On the other hand, the better

[1] See *In re* Baglan Hall Colliery Company, L. R. 5 Ch. 346, 357.
[2] See 15 HARV. L. REV. 844.
[3] Coffin *v.* Ransdell, 110 Ind. 417; Graves *v.* Brooks, 117 Mich. 424.
[4] Taylor *v.* Cummings, 127 Fed. Rep. 108.
[5] See Kelly *v.* Clark, 21 Mont. 291, 335.
[6] Clark *v.* Bever, 139 U. S. 96; Handley *v* Stutz, *ibid.*, 417.

decisions seem to insist on money's worth when property is taken in exchange.[7] The statutes, they hold, point out two methods of payment, but only one standard of value, namely, the par value of the stock. Good faith is immaterial, if in fact there is a careless or reckless over-assessment of property. Thus, when patents on inventions were assigned to corporations at a valuation considerably above the fair value of the property, or when the value was wholly speculative, the stockholders were held liable for the proportional deficiency on their stock.[8] Bad faith, in the sense of actual intention to defraud, can seldom be alleged and less often proved, for most speculators are hopeful of the future. Over-valuation, resulting in watered stock, is generally practised when several plants are combined into a single concern. In a case, last year, before the Court of Chancery of New Jersey, promoters having secured options on, as they alleged, practically all straw-paper manufactories, sold the property to a corporation, formed for the purpose, at a valuation of more than twice the option prices. The defense was made that the alleged monopoly of business thus secured warranted belief in large profits, but the court declared that prospective profits, a mere expectancy, could not be capitalized and regarded as property under the statute. *See* v. *Heppenheimer*, 61 Atl. Rep. 843.

Apart from the difficulty of applying it, the "good-faith" rule seems to lose sight of the true purport of the statutes under which the creditors in these cases commonly seek to enforce their rights. These statutes are really declaratory of a public policy in the regulation of corporations, in favor of the public at large, and especially in favor of prospective creditors.[9] Its capital being the basis of a corporation's credit, the state demands money or its equivalent to be paid by those to whom stock is issued, and gives creditors a direct right, after a corporation's assets are exhausted, to enforce such claim against stockholders who have failed to comply with this condition. The contention is made that inflation is a commonly recognized practice, and no reliance is in fact placed on the declared capital; but it is this very stock-jobbing, whereby inflated stocks are sought to be unloaded on the public, that the state seeks to discourage. Then it is urged, if men who transfer property for full-paid stock are liable to be called for further payment in time of insolvency, desirable consolidations of businesses will be discouraged. The possible evil is highly magnified. For in measuring what is property, a fair and reasonable test should be taken,—such a standard as a business man investing his own funds would apply. Courts allow a wide margin for reasonable differences as to values. The good-will of an establishment is surely an item of property, in estimating which even the reasonable profits of the seller and the enhanced value that comes from peculiar factors, such as a monopoly of the trade, are important considerations. But to allow stocks to be given for contingent profits is to speculate at the public's risk. If courts generally would recognize the public policy behind these statutes, the question would reduce itself simply to one of fact in each case, whether, under all the circumstances of the transaction, the par value of the stock was a fair

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[7] Wetherbee *v.* Baker, 35 N. J. Eq. 501; Gates *v.* Tippecanoe Stove Co., 57 Oh. St. 60; Gamble *v.* Queens County Water Co., 123 N. Y. 91, 103 (*semble*).

[8] See State Trust Co. *v.* Turner, 111 Ia. 664.

[9] See Elyton Land Co. *v.* Birmingham, etc., Co., 91 Ala. 407; Gamble *v.* Queens County Water Co., *supra*.

and reasonable price for the property. The objection as to a possible disinclination to transfer property may be obviated, perhaps, by providing for some statutory publicity of the transfer, and thereby charge creditors with full notice of the facts.

CONTRACTS TO EMPLOY ONLY UNION MEN. — In the relations between an employer, a labor union, union members, and non-union laborers, one of the reciprocal rights involved is freedom to enter into or to refrain from contracts of employment. The destruction of this expectancy may be the basis for actions in tort; it is also capable of being surrendered by contract. Although the question of tort arising from interference with the right has called forth much discussion, and although similar contracts limiting expectancy of traders are the subject of numerous cases on the restraint of trade, contracts dealing with labor expectancy are seldom before the courts. The Court of Appeals of New York, reversing the Appellate Division,[1] has recently sustained a three-cornered contract between an employer, a labor union, and the firm's employees, which provided that only union members should be employed, and only such of those as should be in good standing, and that on request of the union the firm should discharge all others. *Jacobs* v. *Cohen*, 183 N. Y. 207. The decision involves two questions: (1) whether an employer can make, with laborers or with a third party, a binding agreement to limit his expectancy in the labor market; and (2) whether laborers may engage among themselves to destroy the expectancy of other laborers. Another New York court has just decided, in accordance with the prevailing law,[2] that an employer's privilege of employing or discharging union or non-union men at his own caprice is protected by the constitutional guaranties. *People* v. *Marcus*, 34 N. Y. L. J. 1149 (N. Y. App. Div., Dec. 1905). A workman's freedom of employment must also be a property right, and contracts by either to limit his own freedom will be enforceable unless invalid for some reason of policy.

Logically considered, the employer's agreement was to confine his competition for labor to a narrow class, but he did not contract with a competitor, and only such combinations are forbidden, since from them monopoly is more likely to ensue. As contracts for exclusive agency,[3] exclusive dealing,[4] and exclusive employment[5] are freely enforced, there should be not the least objection to the employer's contract.

Under the New York doctrine that procuring without fraud or intimidation the discharge of a fellow servant is not actionable unless done with an improper motive,[6] a contract to effect the same result will of course be unobjectionable unless it be inspired by malevolence.[7] By another view,

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[1] Jacobs *v.* Cohen, 90 N. Y. Supp. 854; 18 HARV. L. REV. 471.

[2] Gillespie *v.* The People, 188 Ill. 176. See also State *v.* Julow, 129 Mo. 163.

[3] Central Shade Roller Co. *v.* Cushman, 143 Mass. 353.

[4] Chicago, etc., Railroad Co. *v.* Pullman Car Co., 139 U. S. 79, 89.

[5] Pilkington *v.* Scott, 15 M. & W. 657.

[6] National Protective Ass'n *v.* Cumming, 170 N. Y. 315; followed in Wunch *v.* Shankland, 179 N. Y. 545; 59 N. Y. App. Div. 482. See also "Interference with Contracts and Business in New York," by E. W. Huffcutt in 18 HARV. L. REV. 423, 439.

[7] See Curran *v.* Galen, 152 N. Y. 33; affirmed but distinguished in National Protective Ass'n *v.* Cumming, *supra*.